(11)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 249

EMMA A. OUERBACKER, - - - - - - Petitioner,

vs.

HENDERSON COUNTY, N. C., Bankrupt, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

AND

SUPPORTING BRIEF.

HENRY S. BELLAMY, JR.,
Kentucky Home Life Bldg.,
Louisville, Ky.,

W. P. SANDRIDGE,
Wachovia Bank & Trust Co. Bldg.,
Winston-Salem, N. C.,

RICHARD M. MAXWELL,
Atlanta, Georgia,
Counsel for Petitioner.

BRADLEY-DUNCAN CO., PRINTERS, LOUISVILLE, KY.

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EMMA A. OUERBACKER, - - - - *Petitioner,*

v.

HENDERSON COUNTY, N. C., BANKRUPT, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Emma A. Ouerbacker prays that a writ of certiorari be issued to review the decree entered on February 23, 1942 (Record, p. 95), in the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled cause. An order extending until July 21, 1942, the time within which this petition might be filed was entered by the Chief Justice on May 20, 1942.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals rendered February 23, 1942 (Record, p. 83), is reported at 126 Fed. (2d) 309.

The order of the District Court approving the plan of composition in bankruptcy is found in the record (Record, pp. 46-55) but is otherwise unreported and no opinion was filed by the District Court.

JURISDICTION.

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code (U. S. C., Title 28, Sec. 347).

SPECIFICATION OF ERRORS.

The Appellate Court erred in affirming the interlocutory decree of the District Court which erroneously confirmed a plan of composition (under Chapter IX of the Bankruptcy Act, 11 U. S. C. A. 401, *et seq.*) of the indebtedness of the respondent, Henderson County.

SUMMARY STATEMENT.

In 1936, respondent, Henderson County, North Carolina, was in financial difficulties. It proposed to its creditors a voluntary refunding plan which extended the maturity of its outstanding bonds and reduced the

interest rates, but made no reduction in the principal indebtedness (Record, p. 3). This plan was declared operative and 98% of the bondholders accepted the plan and exchanged their bonds for refunding bonds. Petitioner was one of the small minority who did not accept the plan or exchange her bonds.

The County operated under the plan from 1936 until 1940 when it again went into default. In 1940, the County proposed to its bondholders a second voluntary refunding plan which further reduced the interest rates and changed the bonds from serial maturities to thirty-year term bonds, callable on any interest date (Record, p. 9). This 1940 voluntary plan had been accepted by over 66⅔% of the bondholders, many of whom had deposited their bonds for exchange thereunder.

On May 27, 1941, respondent county filed its petition in bankruptcy under Section 83 of the Bankruptcy Act (Record, p. 1). Both the April 1, 1936, and the September 1, 1940, refunding plans were filed with the petition as jointly evidencing the proposed plan of composition.

On the same date (May 27, 1941) the District Court entered an order approving the petition "as properly filed" and fixing August 9, 1941, as the date for hearing.

On July 14, 1941, before any hearings had been held upon said petition, the District Court entered an order on the County's motion, authorizing and empowering respondent county "to make exchange of any or all

of the bonds involved in this proceeding, in accordance with the plan of refinancing set forth in the petition" (Record, p. 33), and the Treasurer and the Local Government Commission were "authorized and *directed* to effect such exchange."

On July 26, 1941, petitioner filed an answer to the petition and objections to the plan of composition (Record, p. 17). Thereafter hearings were had and the District Court on September 4, 1941, entered an order (Record, pp. 46-53) finding that the petition was properly filed and approving the plan of composition. From this interlocutory order an appeal was taken to the Circuit Court of Appeals under Section 83(e) of the Bankruptcy Act. The Circuit Court of Appeals affirmed on February 23, 1942.

It is believed that such further statement of facts as is necessary may best be made in connection with the consideration of the questions involved to which such facts have particular relation.

QUESTIONS PRESENTED.

First Question.

Whether the District Court erred in entering its order on July 14, 1941 (Record, p. 33), authorizing and directing the exchange of bonds under the proposed plan of composition prior to a hearing on the merits of the case; and whether the Circuit Court of Appeals erred in affirming this action of the District Court.

In respect to this question the Circuit Court of Appeals said:

> "The *ex parte* order of July 14, 1941, permitting the exchange of the bonds under the plan of composition before the plan was actually ratified, was in our opinion premature and improper; but as it turned out, no interested party was prejudiced by the action, and it furnishes no ground for reversing the decree."

Reasons Relied on for Allowance of Writ.

The *ex parte* order was "premature and improper" as the Circuit Court of Appeals held. The decision involves an important question arising under the Bankruptcy Act and is probably untenable and presents an important question of Federal law, which has not been, but should be, settled by this Court.

The reason put forward by the Circuit Court of Appeals for its action that "no interested party was prejudiced" is an incorrect assumption. By this order the District Court disclosed inordinate haste and a will-

ingness to subordinate its judgment to what appeared to be the desires of certain creditors. This order actually made the plan permanently effective, whereas the most that could have been done under Section 83(c) was to make it "temporarily operative." The order was entered without notice and before time for filing objections had expired. To all intents and purposes the Court committed itself to an approval of the plan before a hearing. The Court thus created a situation under which it could not thereafter pass judgment upon the fairness of the plan in an impartial manner. By its action it deprived itself of its power to exercise an "informed, independent judgment" as required by the decision of this Court in *American United Mutual Life Insurance Co.* v. *Avon Park,* 311 U. S. 138, 85 L. Ed. 91.

Second Question.

Whether the District Court erred in entering an order upon the filing of the petition "approving it as properly filed," under the provisions of Section 83 (a) of the Bankruptcy Act and in permitting the action to proceed, although at the time the petition was filed, the plan of composition had not been accepted in writing by creditors owning not less than 51 per centum in amount of securities affected by the plan as required by said Section 83 (a); and whether the Circuit Court of Appeals erred in approving this erroneous procedure by the District Court.

The Circuit Court of Appeals said "the point has substance" and further said:

> "if a motion to dismiss the petition had been made before the acceptances were received, or if the

deficiency had otherwise come to the attention of the District Judge, a dismissal of the petition would have been required."

The Circuit Court of Appeals justified its ruling on the ground that when a motion to dismiss was made on September 4, 1941, on final hearing, a sufficient number of written acceptances had been received and "there being but one objector * * * the objection could have been met completely on September 4, 1941, merely by refiling the petition."

Reasons Relied on for Allowance of Writ.

The decision of the Circuit Court of Appeals has approved a course of procedure directly contrary to the mandatory provisions of Section 83(a) of the Bankruptcy Act and the decision is probably untenable and concerns an important question of Federal law in the administration of the Bankruptcy Act which has not been, but should be, settled by this Court.

The objection is not purely formal or technical. Acceptances of a voluntary plan of reorganization are one thing and acceptances of a plan of composition in bankruptcy are another. Acceptances received after a petition in bankruptcy is filed are not the same as acceptances required before such a petition can be filed. Section 83(j) of the Bankruptcy Act shows the importance which Congress attached to this question.

When H. R. 9139 containing amendments to the Municipal Bankruptcy Act was before the House in

1940, proposals were made that acceptances under a voluntary refunding plan should automatically constitute acceptances of a similar plan of composition in bankruptcy. These proposals were rejected and the committee on Judiciary in its Report No. 1901 stated its reasons for this rejection as follows:

> "Your committee are of the opinion that the time element is important in this connection, and that regardless of the terms and conditions of the plan previously accepted by the bondholders, and even regardless of whether the plan in bankruptcy is not less favorable than the refunding plan previously accepted by the bondholder, the law should permit the bondholder to have the opportunity of accepting or rejecting the plan in bankruptcy at the time such plan is submitted to the bondholder."

When acceptances were later filed, it appeared that many of them had been executed by agents or representatives of bondholders and the Court made no effort to require any showing of authority by such agents or representatives as required by Section 83(a).

Proceedings under the Municipal Bankruptcy Act are not adversary proceedings in the usual sense. It is the duty of the Bankruptcy Court to require that all proceedings be in conformity with the Act, whether objection is made or not. The County knew that such written consents were necessary because on May 23, 1941, only four days before the petition was filed, it addressed a letter (Record, p. 15) to all bondholders, asking for such written consents, and it knew they had not been received on May 27th. The District Court

should have inquired into this fact, and the County should have disclosed it. Under these circumstances, the petition was not "filed in good faith."

Third Question.

Whether the District Court erred in finding (Record, p. 48) that in 1940, the County was "insolvent or unable to meet its debts as they matured" under the provisions of Section 83 (a) of the Bankruptcy Act; and whether the Circuit Court of Appeals erred in sustaining such finding of insolvency.

The District Court found that the "plan of 1936 was too burdensome for the taxpayers of the County to meet." It further found that the assessment of $22,081,210.00 "is excessively high," and further found that to require a levy sufficient to meet its obligations under the 1936 plan "would result in a large number of foreclosures * * * with the ultimate result that the source of revenue from taxation is considerably decreased." The Circuit Court of Appeals affirmed this finding and stated:

> "that if the tax rate was made sufficient to meet the County's obligations under the 1936 plan and also the additional School District obligations, the tax would be doubled, additional properties would be taken over by the foreclosure, and the resulting tax collections would be greatly reduced."

and concluded:

> "the District Court was justified in its finding that the County was unable to meet its obligations as

they matured, in that a tax levy sufficient for the purpose would result in decreased collections and the taking over of a large amount of property, whereby the financial structure of the county and the value of its securities in the hands of the bondholders would be impaired."

Reasons Relied on for Allowance of Writ.

The decision of the Circuit Court of Appeals that the County was insolvent within the meaning of Section 83(a) of the Bankruptcy Act is a decision of an important question arising under the Act which is probably untenable and is a decision of an important question of Federal law which has not been, but should be, settled by this Court.

While the above statements are presented as findings of fact by the District Court and affirmed as such by the Circuit Court of Appeals, they are unsupported by evidence of any substantial value and are in reality nothing but conclusions. They are based entirely upon an affidavit of the Chairman of the Board of County Commissioners and to a large extent they follow and adopt the language of that affidavit (Record, p. 55).

The question of insolvency within the meaning of Section 83(a) should not be determined upon such unsatisfactory generalities. The conclusions reached are completely refuted by other evidence in the case. The 1936 plan and the 1940 plan were sponsored by the same groups and it may be assumed that the representatives of the creditors and the County carefully

surveyed county valuations and assessments and potential tax rates before recommending each of those plans. The total assessment increased from $20,661,097.00 in 1933 to $22,081,210.00 in 1940 (Record, p. 34). The record fails to disclose any protest as to these valuations until the Board Chairman for the purposes of this case, designated them as "excessively high."

During the same period, the bonded indebtedness decreased from $3,475,000.00 in 1933 to $2,638,000.00 in 1940, a decrease of 20.6% (Record, p. 34). While the total county tax rate rose from 95 cents to $1.25, the portion of the tax allocated to debt service was increased only from 53 cents to 63½ cents. During the same period, the total taxes collected increased from $132,536.09 in 1933 to $227,881.71 in 1940, and taxes collected for debt service increased from $65,185.64 in 1933 to $105,283.11 in 1940.

Henderson County is not limited in the rate of tax it may levy. The tax levies just prior to the adoption of the 1940 refunding plan were not sufficient even at a 100% collection to meet the principal and interest requirements under the 1936 plan.

Until there has been an actual bona fide effort made to levy and collect taxes sufficient to meet outstanding obligations and until such effort has failed, it is merely speculation to suggest that any particular tax rate will result in diminishing returns. It is difficult to envisage a case of real insolvency where a public debt is only some 12% of the assessed valuation.

If emphasis is placed upon the County's inability "to meet its debts as they mature" such inability re-

lates only to the large amount of past due School District indebtedness, the assumption of which by the County between 1936 and 1940 was solely responsible for this condition. The Circuit Court of Appeals based its finding (*supra*) upon the premise that the County was responsible for the recently assumed School District indebtedness (Record, p. 84). Strangely enough, as hereinafter shown, the School District indebtedness which could not be paid was not included in the plan of composition but all other indebtedness was included.

Again, had the County seen fit to do so it might have issued fifty-year bonds bearing a higher rate of interest than called for by the plan of composition, with an annual tax levy no greater than was pledged under the plan (N. C. Code, Sec. 1334(11). That such an arrangement would have been to the interest of the creditors is self-evident.

Furthermore, the record is completely silent as to the disposition of tax revenues and general income of the County and the amount and character of expenditures it was making for ordinary governmental expenses. The Court should have made an investigation to determine whether or not savings could be made in general expenditures for the benefit of debt service. De Foe v. Town of Rutherfordton, 122 Fed. (2d) 342; Maryland Casualty Co. v. Leland, 214 N. C. 235, 199 S. E. 7. Without such showing there was no basis for finding of insolvency.

Fourth Question.

Whether the District Court erred in failing to recognize a judgment rendered by that Court in favor of the petitioner against the respondent County as establishing the amount of petitioner's claim as a creditor of the County, and whether as a result of such failure the District Court further erred in approving two plans of composition in the same proceeding; and whether the Circuit Court of Appeals erred in sustaining the District Court's actions in these particulars.

When the County defaulted under the 1936 plan the petitioner obtained a judgment against the County in the District Court for certain interest coupons which had matured and remained unpaid. This judgment was never modified, set aside, nor appealed from. The judgment was rendered August 12, 1940, nine months before the bankruptcy petition was filed, and petitioner offered this judgment as evidencing, in part, the amount of her claim.

The District Court refused to recognize this judgment. This was not a casual oversight, but was done deliberately to force petitioner to exchange her bonds under the 1936 plan. The Circuit Court of Appeals approved this action of the District Court on the ground that

> "the objector would have had an unfair advantage over the remaining bondholders if she had been paid the over-due interest on the original bonds held by her instead of the amount of interest payable to her if she had accepted an exchange under the plan of 1936."

This explains why both the 1936 plan and the 1940 plan were filed with the bankruptcy petition, although the Act does not contemplate the filing of two plans at the same time.

Reasons Relied on for Allowance of Writ.

The decision of the Circuit Court of Appeals approving the action of the District Court in disregarding its own judgment as fixing the amount of petitioner's claim as a creditor of the County was a decision of an important question of general law in a way probably untenable and in conflict with the weight of authority, and was a decision of a federal question in a way probably in conflict with applicable decisions of this Court, and so far sanctions by the District Court such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power to supervision. Section 63(a) of the Bankruptcy Act (11 U. S. C. 103a) expressly provides that debts founded upon a judgment may be proved and allowed. Section 82 of the Act includes a judgment within the definition of "security." The action approved by the Circuit Court of Appeals is a direct violation of both of these sections.

The District Court in expressly disregarding its own judgment ordered and adjudged (Record, p. 54) that this petitioner "in lieu of her judgment" was

> "entitled only to receive interest as provided in the petitioner's plans of refunding."

Having committed one error in failing to recognize its own judgment, the Court was forced to commit a second error in permitting two voluntary plans to be filed at the same time. Whether this is treated as two plans of composition or one plan of composition based upon two voluntary plans, the error is the same because the Court must have granted a hearing on both plans which it utterly failed to do.

The 1936 plan was necessarily a voluntary plan because at that date the Act did not permit the County to file a bankruptcy petition. That plan, however, had been declared operative and 98% of the creditors had finally exchanged under it. By the County's own admission, the 1936 voluntary plan had become no longer feasible or capable of being completed. Therefore, the County had no right to force this bondholder to accept such a plan and the bankruptcy court could not at that time declare such a plan to be either fair or equitable. If the 1936 voluntary plan was to be completed under Section 83(j), this could only be done by a separate proceeding under which all creditors must have had notice and opportunity to re-file their consents.

Furthermore, bondholders' rights must be fixed as of the date of filing the bankruptcy petition. Where petitioner's claim had been reduced to judgment nine months prior to the petition in bankruptcy, the County cannot go back over a period of four years to have her rights determined retroactively.

The County wished to force the petitioner to make an exchange under the 1936 plan, although it had no power to do so and although the Court had to disregard a judgment which it had entered in her favor.

Fifth Question.

Whether the District Court erred in holding that the plan was "fair, equitable and for the best interests of the creditors" and did not "discriminate unfairly against any creditor or any class of creditors" where a substantial amount of School District indebtedness assumed by the County was not included in the plan; and where the plan required petitioner to make a concession of interest disproportionate to that required of others; and whether the Circuit Court of Appeals erred in reaching a similar conclusion.

The District Court found (Record, p. 48) that respondent County had

> "agreed to assume * * * the indebtedness of all the School Districts and levy a general County-wide tax for the purpose of meeting the maturing unpaid indebtedness of the various Districts who had issued special District Bonds."

This created an additional indebtedness on the part of the County in the sum of $355,000.00, of which approximately $250,000.00 was past due. With ten years' accrued interest of approximately $150,000.00 also owing thereon, the total debt assumed was over $500,000.00, or about 18% of the general debt. This indebtedness is payable out of funds derived from same

source as were the bonds included in the plan of composition. The Circuit Court of Appeals said:

> "The School District Bonds are in a separate class, for it appears that the County has assumed the obligation to pay them, and the holders of bonds have the right to look not only to the County, but also to the School Districts themselves for payment."

Reasons Relied on for Allowance of Writ.

The decision of the Circuit Court of Appeals that the School District Bonds were in a separate class from other County bonds and that the plan was fair and equitable and non-discriminatory is a decision of an important question under Section 83(b) of the Bankruptcy Act and is probably untenable and is a decision of an important question of Federal law which has not been, but should be, settled by this Court.

Section 83(b) provides, in part,

> "that the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class."

The School District indebtedness assumed by the County is payable out of funds derived from the general power to tax just as is the other County indebtedness. In fact the 1940 plan expressly provided (Record, p. 12):

> "In the event that the County is compelled hereafter to assume the present outstanding bonds of school districts within the County, collections from these levies will be applied to the county refunding bonds issued hereunder and to the school bonds, when and if refunded and assumed by the County, in the proportion that the debt of each bears to the total."

The statement of the Circuit Court of Appeals that the School District bonds were in a separate class because the holders could look both to the County and to the School District for payment does not meet the realities of the situation. If there was not an honest undertaking by the County to assume *sole* responsibility for this School District indebtedness and to completely relieve the Districts of this obligation then the whole process of assumption by the County was nothing but a sham.

The Circuit Court of Appeals further attempted to justify its decision on the ground that:

> "The 1940 plan states that the principal holders of Hendersonville Graded School District Bonds have indicated their willingness to accept refunding bonds * * * and that the details of the assumption by the County of the District Bonds will be presented in the form of a refunding plan at an early date."

This reason for omitting a substantial part of the County indebtedness from the plan of composition is wholly inadequate. The holders of School District

Bonds have committed themselves to nothing. They might consent to a refunding plan or they might not. They might dispose of their bonds to a purchaser who would not so consent, and who might insist upon payment. Thus a part of the bondholders are required to accept a composition while another part of the bondholders are not so required.

The treatment of the School District Bonds by the District Court and the Circuit Court of Appeals has been inconsistent throughout. The existence of this indebtedness was fully considered by the District Court and this added obligation, on the part of the County, was one of the chief reasons for the finding of insolvency. At the preliminary hearing the Honorable County Attorney made the following statement:

> "Then changed conditions brought about the necessity of our taking over some obligations in connection with school bonds, which increased our debts on three hundred and fifty or four hundred thousand dollars, of which approximately one-half of that amount fell due or has already matured, so that for this reason it became utterly impossible to carry out the 1936 plan. If we levied for all, the tax rate would have been multiplied four or five times. So in September, 1940 we offered a new plan."

In other words, the obligation which furnished the basis for the claim that the County was insolvent and entitled to institute bankruptcy proceedings was entirely omitted from the plan of composition. If these obligations were of a separate class as the Circuit Court

of Appeals held and were to be handled under a separate plan of composition they should not have been considered in this proceeding for any purpose. Furthermore, the 1940 plan contained a promise that the School District Bonds would come in under that plan and acceptances of the plan were received on that basis. In no event should the present plan have been approved until this condition had been complied with.

The plan was also unfair and inequitable and discriminated against the petitioner on other grounds. The original bonds carried rates of interest varying from 4¾% to 6%. The 1936 plan (Record, p. 5) provided for all past due coupons and interest to be paid "on a basis representing 1¾% annual interest on the outstanding bonds." No provision was made for interest on past due coupons; all new bonds carried the same rate of interest without regard to the interest rates carried by the original bonds; and no effort was made to preserve the original order of maturities.

The Circuit Court of Appeals admitted that this involved "a failure to preserve certain advantages" of this petitioner, but concluded that since most of the creditors had accepted the plan, it should not be set aside. This action also was violative of the spirit of the Act.

Sixth Question.

Whether the District Court erred in finding that no fiscal agent promoting the composition was compensated by both the debtor County and its creditors and in further finding that the North Carolina Municipal Council, Inc., was not employed by the County to promote the plan of composition, and in refusing to dismiss the petition; and whether the Circuit Court of Appeals erred in approving such findings.

The District Court found (Record, p. 52):

> "that the North Carolina Municipal Council, Inc., was not employed by the County, nor was it obligated in any way to participate in, promote or encourage the adoption or approval of the plan of composition."

The District Court completely disassociated the Council from the bankruptcy proceedings and thus attempted to justify its further finding that no fiscal agent of the County received compensation from both sides. The Council was not a public agency, but only a private corporation fulfilling the ordinary functions of a bondholders' committee.

The Circuit Court of Appeals found no objection to the activities of the Council, largely because no secret profits were involved and compensation of the Council was fully disclosed. The Court said:

> "The principle is sound, but the facts affirmatively show that it was not violated in the solicitation of acceptances by the North Carolina Municipal Council in this case. Its employment at

the expense of the county was disclosed on the face of both the 1936 and 1940 plans. Its organization to secure information for the holders of bonds issued by North Carolina government units was not secret, and any bondholder was at liberty to become a member and have the benefit of its services. No member of the Council received any profit or benefit from the employment of the Council by the county, or any benefit from the exchange of bonds under the plan, that was not disclosed by the plan and shared with all creditors alike. In fact, the non-member bondholders were saved the payment of membership dues. The finding of the District Judge to this effect was supported by the evidence."

Reasons Relied on for Allowance of Writ.

The decision involves an important question arising under Section 83(e) of the Bankruptcy Act, which is probably untenable and presents an important question of Federal law which has not been, but should be, settled by this Court.

The June 28, 1940, amendment to Section 83(e) requires the Bankruptcy Court to carefully examine all transactions to ascertain whether any fiscal agent or other party promoting the composition has been compensated by both the debtor and creditor. The section further provides that:

> "if it be found that any such practice be possible he shall forthwith dismiss the proceedings and tax all of the costs against such fiscal agent * * *."

Congress did not approve of the practice whereby a fiscal agent would represent both parties. It did not permit the Court to determine whether harm was done or not, but mandatorily required dismissal of the action if such facts existed. The District Court avoided this question by finding that the North Carolina Municipal Council had nothing to do with the plan of composition. This clearly was incorrect. The Council had promoted the 1936 plan and had also promoted the 1940 plan, and is to receive a fee on each bond deposited under the 1940 plan, even as a plan of composition. It had been paid by the County for such services. After a great number of acceptances had been received for the 1940 plan the county adopted this voluntary refunding plan as its own plan of composition and then claimed that the Municipal Council had dropped out of the picture. In its May 23, 1941, letter to creditors the County asked acceptances for the very plan promulgated by the Council and consents were urged "in view of your assent to and/or your deposits of bonds under the Refunding Plan dated September 1, 1940." The 1940 plan itself had stated: "The County by appropriate proceedings will request the Federal Court of the Western District of North Carolina to approve the terms of this plan." Such an avoidance of the mandatory provisions of the Act is not permissible.

Nor is the situation corrected merely because there was no concealment as the Circuit Court of Appeals held. It is clearly shown in the record that the Council was composed largely of investment dealers and brok-

ers and that the Council was supported by dues paid by its members. The Council was nothing more than a bondholders' committee acting as agent and representative of the bondholders. When it accepted compensation from the county it placed itself in a dual capacity, which is condemned by the Act.

No claim is made in this case that this compensation was concealed or that any secret profit was made by the Council as such. However, it did appear that certain members of the Council sold bonds to the County during the period of default, subsequent to 1933 (Record, p. 36). The District Court made no inquiry into these transactions. The question of the Council's position, however, is of great importance because Municipal Bankruptcy proceedings are customarily initiated and prosecuted under similar arrangements. The decision of the Circuit Court of Appeals if unchallenged and uncorrected would permit this practice to continue, thus opening the door to fraud, and would condone a violation of the express provisions of the Act.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

HENRY E. MCELWAIN, JR.,
Kentucky Home Life Bldg.,
Louisville, Ky.,

W. P. SANDRIDGE,
Wachovia Bank & Trust Co. Bldg.,
Winston-Salem, N. C.,

RICHARD M. MAXWELL,
Atlanta, Georgia,

Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____.

EMMA A. OUERBACKER, - - - - *Petitioner,*

v.

HENDERSON COUNTY, N. C., BANKRUPT, - *Respondent.*

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The errors pointed out in the petition for certiorari were all called to the attention of the District Court and the Circuit Court of Appeals. The objections of the petitioner were disregarded by both courts for the sole reason that petitioner was in a small minority and both courts appeared to feel that the wishes of the majority of the creditors must control in spite of obvious errors in the proceedings.

The Circuit Court of Appeals in the first paragraph of its opinion stressed the fact that petitioner "owned less than 1% of the indebtedness affected by the plan." In the last paragraph of its opinion, the Court stated that the wishes of the majority creditors were not to be defeated without good cause "by a recalcitrant minority, no matter how persistent."

Petitioner concedes that 98% of the bondholders had exchanged under the 1936 voluntary refunding plan and that more than 66⅔% of the bonds had been deposited for exchange under the 1940 voluntary refunding plan when this petition was filed. However, cases under the Municipal Bankruptcy Act will never be initiated unless the proposed plan of composition is approved in advance by a substantial majority of the creditors. If there is objection to any plan or to any proceeding, it must always come from a small unorganized minority.

The petition thus presents a preliminary question of importance, namely, whether serious and substantial errors in such proceedings cease to become grounds for objection merely because the minority interests are relatively small in number; or to put the question another way, do the mandatory provisions of the Municipal Bankruptcy Act depend for their effectiveness upon the number of non-consenting creditors?

Petitioner may frankly admit that her actual pecuniary interests in this case are relatively small compared to the interests of the creditors who have accepted the plan. In fact, the actual amount of money involved might perhaps be too small to justify presenting these problems to this Court in an ordinary case. This case, however, is not an ordinary case. A great number of cases all over the country are continually arising under the Municipal Bankruptcy Act. If the decision of the Circuit Court of Appeals in this case is allowed to stand unchallenged and uncorrected by

this Court, it will stand as authority for the approval of similar errors in other cases and may well result in a complete distortion of the purposes of the Act.

As this Court so clearly pointed out in the case of *American United Mutual Life Insurance Co.* v. *Avon Park,* 311 U. S. 138, 85 L. Ed. 91, Congress did not intend the Municipal Bankruptcy proceedings to be controlled exclusively by any numerical percentage of creditors, nor did Congress intend that the interests of the minority, no matter how small, should be under the absolute control of the majority. "The Court is not merely a ministerial register of the vote of the several classes of security holders." *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 114, 84 L. Ed. 110, 119. The bankruptcy court was to be the fair and impartial arbiter exercising at all times an "informed, independent judgment." Both the District Court and the Circuit Court of Appeals failed to perform this function in this case and approved of erroneous proceedings merely because it was represented that the majority of creditors were anxious to rush the plan through to a conclusion.

Nor are opinions of local agencies such as the Local Government Commission, nor of bondholders' committees such as the North Carolina Municipal Council, Inc., entitled to any compelling weight in cases of this character. Local agencies, by common knowledge, have a natural tendency to favor what appears to be the interest of local taxpayers and local communities. Bondholders' committees usually composed, as here,

largely of investment dealers and brokers representing, among others, banks and fraternal orders (Record, p. 59), have by common knowledge a natural tendency to approve any proceeding which will keep securities current and avoid the necessity of carrying securities in default. The bankruptcy court alone is in a position to survey the whole situation with an unprejudiced eye, to weigh conflicting claims and interests and to reach a final decision as to whether any proposed plan is

> "fair, equitable and for the best interests of the creditors and does not discriminate unfairly against any creditor or any class of creditors."

The District Court in this case succumbed to the compelling weight of numbers and to what appeared to be the superior judgment of the local Commission and the bondholders Committee. The Court did not investigate the written consents; it did not even wait for a hearing before actually putting the plan into effect; it made no independent investigation of the financial position of the County; it disregarded a judgment itself had entered; it passed upon and approved two plans in one proceeding; it failed to bring all creditors of the same class within the plan; and it misconceived the activities of the fiscal agent. At no time during the proceedings did the District Court insist on the minimum requirement of "full disclosure" as to any aspects of the plan. In short, it did nothing but act as

a register of the majority vote in direct violation of the principles heretofore announced by this Court.

The actions of the District Court and the approval thereof by the Circuit Court of Appeals evidence such a complete and utter disregard of the clear meaning and intent of the Municipal Bankruptcy Act as to justify a review of this case by this Court. It is submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY E. MCELWAIN, JR.,
Kentucky Home Life Bldg.,
Louisville, Ky.,

W. P. SANDRIDGE,
Wachovia Bank & Trust Co. Bldg.,
Winston-Salem, N. C.,

RICHARD M. MAXWELL,
Atlanta, Georgia,

Counsel for Petitioner.

APPENDIX.

Copy of Statutes Involved.

TITLE 11 U. S. C., CHAPTER VII, SECTION 103.

SECTION 63.

Debts which may be proved.—a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. * * *

Further Excerpts from Municipal Bankruptcy Act.

TITLE 11, U. S. C., CHAPTER IX.

SECTION 82. *Definitions.*

* * * * *

"The term 'security' shall include bonds, notes, judgments, claims, and demands, liquidated or unliquidated, and other evidences of indebtedness, either secured or unsecured, and certificates of beneficial interest in property."

* * * * *

SECTION 83. *Compositions—(a) Petition; plan of composition; creditors.*

"Any petitoner may file a petition hereunder stating that the petitioner is insolvent or unable to meet its debts as they mature and that it desires to effect a plan for the composition of its debts. The petition shall be filed with the court in whose territorial juris-

diction the petitioner or the major part thereof is located, and, in the case of any unincorporated tax or special assessment district having no officials of its own, the petition may be filed by its governing authority or the board or body having authority to levy taxes or assessments to meet the obligations to be affected by the plan of composition. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in lieu of the fees required to be collected by the clerk under other applicable chapters of the Uniform Bankruptcy Act of 1898, as amended. The petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than 51 per centum in amount of the securities affected by the plan (excluding, however, any such securities owned, held, or controlled by the petitioner), have accepted it in writing. There shall be filed with the petition a list of all known creditors of the petitioner, together with their addresses so far as known to petitioner, and description of their respective securities showing separately those who have accepted the plan of composition, together with their separate addresses, the contents of which list shall not constitute admissions by the petitioner in a proceeding under this chapter or otherwise. Upon the filing of such a petition the judge shall enter an order either approving it as properly filed under this chapter, if satisfied that such petition complies with this chapter and has been filed in good faith, or dismissing it, if not so satisfied."

* * * * *

SECTION 83(b). *Hearing.*

* * * * *

"If, however, the material allegations of the petition are sustained, the judge shall classify the creditors according to the nature of their respective claims and interests: Provided, however, That the holders of all claims, regardless of the manner in which they

are evidenced, which are payable without preference out of the funds derived from the same source or sources shall be of one class."

* * * * *

SECTION 83(e). *Confirmation of plan; dismissal of proceedings if profit to person promoting composition appears; modification; appeal.*

"Before concluding the hearing, the judge shall carefully examine all of the contracts, proposals, acceptances, deposit agreements, and all other papers relating to the plan, specifically for the purpose of ascertaining if the fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such a nature, has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof, or any of such creditors—either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue —and shall take evidence under oath to make certain whether or not any such practice obtains or might obtain.

"After such examination the judge shall make an adjudication of this issue, as a separate part of his interlocutory decree, and if it be found that any such practice be possible, he shall forthwith dismiss the proceeding and tax all of the costs against such fiscal agent, attorney, or other person, firm or corporation promoting the composition, or doing anything of such a nature, or against the petitioner, unless such plan be modified within the time to be allowed by the judge so as to eliminate the possibility of any such practice, in which event the judge may proceed to further consideration of the confirmation of the plan. If it be found that no such practice is possible, then the judge may proceed to further consideration of the confirmation of the plan.

"At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of

law thereon, and shall enter an interlocutory decree confirming the plan if satisfied that (1) it is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; (2) complies with the provisions of this chapter; (3) has been accepted and approved as required by the provisions of subdivision (d) of this section; (4) all amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable; (5) the offer of the plan and its acceptance are in good faith; and (6) the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan. If not so satisfied, the judge shall enter an order dismissing the proceeding."

* * * * *

SECTION 83(j). *Effect of partial completion or execution of plan.*

"The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this Act by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this Act, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition."

NORTH CAROLINA CODE OF 1939.

SECTION 1334 (11).

Maturities of bonds.—All bonds shall mature as hereinafter provided, and no funding or refunding bonds shall mature after the expiration of the period herein fixed for such bonds, respectively; and no other bonds shall mature after the expiration of the period estimated by the governing body as the life of the improvement for which the bonds are issued, each such period to be computed from a day not later than one year after the passage of the order. Such periods shall not exceed the following for the respective classes of bonds:

(a), (b) Funding or refunding bonds, fifty years.

* * * * *

Editor's Note.—The Act of 1929 added subsections (i) and (j) to this section. The Act of 1931 struck out clauses (a) and (b) and inserted in lieu thereof clause (a), (b).

Prior to Public Laws 1933, c. 259, subsection (a) of this section provided for thirty years in case the debt was less than ten per cent of the assessed valuation of property in the county and fifty years in other cases.

Chapter 203—North Carolina Public Laws 1939.

That with the approval of the Local Government Commission of North Carolina and with the consent of the holders of such percentage or percentages of its indebtedness as may be required by Public Act Number three hundred two of the Seventy-fifth Congress, First Session, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July first, one thousand eight hundred

ninety-eight and Acts amendatory thereof and supplementary thereto," approved August sixteenth, one thousand nine hundred thirty-seven, as amended, any taxing district, local improvement district, school district, county, city, town or village in the State of North Carolina is authorized to avail itself of the provisions of said Act of Congress as said Act now exists or may be hereafter amended.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 249

EMMA A. OUERBACKER
Petitioner

v.

HENDERSON COUNTY, N. C., BANKRUPT
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT

KESTER WALTON,
Asheville, North Carolina.

M. M. REDDEN,
Hendersonville, North Carolina.

THOS. H. FRANKS,
Hendersonville, North Carolina.

Counsel for Respondent.

PLAINDEALER PRINTING CO., HENDERSONVILLE, N. C.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent, Henderson County, contends that there was no error in the interlocutory decree of the District Court nor in the opinion of the Circuit Court of Appeals in affirming the said decree.

STATEMENT OF FACTS

The essential facts necessary for an understanding of this case are carefully and concisely set out in the opinion of the Circuit Court of Appeals (R. 83-87) and for this brief

the respondent adopts the statement of facts in the opinion as its own.

ARGUMENT

The numerous "questions presented" in the petition beginning on page 5 are not in any logical or coherent order; but, nevertheless, for convenience sake they will be taken up in this argument in the same order as presented in the petition.

FIRST QUESTION

Appellant contends that the District Court erred in authorizing exchange of bonds prior to the hearing on the merits of the case. If this was error it was harmless, being without prejudice to the petitioner, the appellant, or other creditors. Two plans of refinancing were submitted as one plan of composition. The first plan is dated 1936; the second plan 1940. Prior to the filing of the petition 98% of the creditors, or all who could be found except this appellant, had agreed to the 1936 plan, and this plan had been in operation for four years until the County realized its inability to continue to meet the plan. In 1940 a supplemental plan was offered. And when the petition was filed more than 66 2/3 per cent of the petitioner's creditors had filed their bonds with the designated depository, viz., the State Treasurer, for exchange, and had also signed written acceptances of the plan, and a considerable sum of these bonds had been exchanged. Many of the bondholders, after the filing of the petition, desired to exchange their bonds without waiting for the confirmation of the plan of composition by the Court. The fact that the exchanges were made with the consent of the County and the bondholders, which was approved by the trial Judge, could in no sense and by no stretch of the imagination prejudice the appellant.

The order did not require any bondholder to exchange his bonds, it simply permitted him to do so.

Under Chapter 9 of the Bankruptcy Act as amended, it is clear that a plan of composition may consist of a previous refunding plan or plans where the bonds had already been exchanged before the filing of the petition for composition of debt. (Bankruptcy Act Sec. 83 [j]).

SECOND QUESTION

Here appellant contends the Court erred in approving the petition for composition of debt, in that creditors who owned 51 per cent of the securities had not accepted the plan. As stated heretofore, 98 per cent of the bonds had been exchanged under the 1936 plan of refinancing, and a considerable sum under the 1940 plan, prior to the filing of the petition. Written assents to each plan, which included a substantial majority of the creditors, accompanied the delivery of the bonds for exchange to the State Treasurer. The accompanying assents did not refer to "a plan of composition." They did refer to "a plan of refinancing." The difference would seem to be tweedle dum or tweedle dee. They were agreeing to the offer made by the County to refinance its debts. At the time the petition was filed, the percentage of acceptances, in writing, amounted to more than 98 per cent of the 1936 plan, and more than 66 2/3 per cent of the 1940 supplemental plan.

When the hearing on the petition for composition of debt came before the District Court on September 4, 1941, 95 per cent, or more, of the County's creditors had formally accepted the plan of composition, in writing, and these acceptances were offered in Court. No point was made concerning an insufficient number of acceptances to the plans of refinancing or the plan of composition. The appellant raised the question first in the Court of Appeals. To this procedure the Appellate Court replied that the appellant waived this objection, if in fact it ever had foundation and if the facts should have war-

ranted a dismissal for this reason, the Court could have permitted a refiling of the petition which would have met the objection made.

We direct attention to the Court of the fact that this proceeding is of equitable nature whereby the Court looks to the justice of the cause, rather than the technical objections which undertook to destroy rights. The whole purpose of the Bankruptcy Act as it relates to municipalities was to afford them relief in Courts of equity, so that the public might not be burdened extremely by those who seek to exact the last "pound of flesh." Does it not appeal to the conscience of the Court that the petition has merit, since now, as disclosed by the record, of all the County's creditors the sole objector is the appellant herein? To permit a single objector, holding a fractional part of the bonds, to upset this plan of refinancing, would nullify the spirit and purpose of the Bankruptcy Act as administered by the Courts of equity. As evidence of the harsh rule sought to be applied by the appellant, the record discloses she declined to accept the 1936 plan, and after waiting more than four years, declined to accept a supplemental plan thereto. She demands the fulfillment of her contract to the letter, irrespective of the injury to the public. Apparently, she would destroy a municipality as a governmental unit and all its governmental functions, rather than accede to the reduction of a small amount of her interest.

In Kelley, et al, vs. Everglade Drainage Dist., 127 F. 2d 808, a part of the required 51 per cent of acceptances came from a Bondholders Protective Committee. This committee had owned some of the bonds less than thirty days, and under the state law it was necessary to give thirty days' notice before sale could be completed. The Bondholders' Committee, therefore, did not have complete title to the bonds at the time the acceptances were executed. The Court held that since it did not appear that any of the bondholders who were selling

their bonds to the Committee objected to the plan, the acceptances were technically illegal, yet the Circuit Court of Appeals held that this was not sufficient grounds for dismissal, especially in view of the fact that 99 per cent of the creditors had accepted the plan.

Extreme technicalities are never sanctioned by Courts of equity, especially when no damage is done.

THIRD QUESTION

Appellant contends that the District Court erred in finding and holding that Henderson County was insolvent or unable to meet its debts as they matured. There was ample evidence for this finding and none to the contrary. D. G. Wilkie, Chairman of the Board of Commissioners; George H. Adams, Chief Refinancing Division, Local Government Commission of the State of North Carolina; W. Kelvin Gray, President, Municipal Council, Inc., all testified to the absolute inability of the County to meet its obligations as they would mature and as they had matured. Reasons were given to support their conclusions. The witness Adams (Page 67 of the Record) stated that he had made a survey of the financial conditions of the County, at the request of the County officials, and definitely recommended the adoption of the plan of composition and the plans of refinancing submitted to the creditors prior thereto.

The Local Government Commission of North Carolina is, by virtue of State Statute, supervisor of the finances of counties and towns. Its investigation and conclusion that the County must have relief should be seriously considered by the Court as a reason for approving the plan of composition.

Counsel for appellant challenges this finding on the part of the trial Judge and the approval thereof by the Court of Appeals without pretense of reason, except to say that the

judgment and findings of the trial Judge were substantially according to the testimony and followed the testimony in its findings. This is as it should have been. In fact, we believe appellant's counsel concede the merit of the finding on the part of the Court of the inability of the County to meet its obligations as they matured by the following excerpt taken from their Brief:

> (Appellant's Brief, page 10) "The 1936 plan and the 1940 plan were sponsored by the same groups, and it may be assumed that the representatives of the creditors and the County carefully surveyed the County valuations and assessments and potential tax rates before recommending each of those plans."

Of course, the state officials and county officials, as required by law, did "carefully survey the County valuations and assessments and potential tax rates before recommending each of those plans." That was the reason for recommending the plans. The facts corroborated their investigation and appraisal of the ability of the County to meet its obligations, and the Court so found.

On Page 12 of Appellant's Brief, counsel contends that the record is silent as to the disposition of tax revenue and general income of the County.

The trial Judge in the District Court authorized appellant's counsel to go to the records of the County and thoroughly investigate the condition of the County, or in lieu thereof, submit questions to be answered, which would disclose the County's financial condition and the disposition of revenues, and counsel accepted the latter and prepared questions which were answered and introduced in evidence by appellant's counsel. These answers were not challenged. They have not been challenged to this date, except by inference in their present Brief. At this late date surely they should not complain when the door was so wide open for them in the beginning. The

County cooperated and extended them every courtesy and answered every question asked and furnished additional information which disclosed the full financial status of the County.

Then also we might say by way of reiteration, if the plan of composition is so unjust to the creditors surely its injustices could be discovered by more than one fractional creditor. Human mind is such that it can argue on either side of any question, whether supported by facts or not, and in this case the imagination of the appellant that she is being unfairly treated seems to arise only because of her ability to imagine.

In Taylor vs. Provident Irr. Dist., 123 F. 2d. 965, it was contended that the record failed to disclose sufficient valuation data to enable the trial Court to reach a conclusion as to the fairness of the plan. The Court of Appeals, Ninth Circuit, held that the evidence was adequate and sufficient. Taylor filed a petition in this Court for writ of certiorari, which was denied, 86 U. S. L. ed. 811 (Advance Sheets). In Lorber vs. Vista Irr. Dist., 127 F. 2nd 628, and in other cases, the Circuit Court of Appeals, Ninth Circuit, stated the test "as to the fairness of the plan to be whether or not the amount to be received by the bondholders is all they can reasonably expect under the circumstances." Whether a taxing unit is solvent is a difficult question. The assets of the taxing unit consist only of the indefinite power to levy and collect taxes. Neither a county nor a city has unlimited taxing power. Faitoute Iron and Steel Co. vs. Asbury Park, 86 U. S. L. ed. 1108 (Advance Sheets).

FOURTH QUESTION

Appellant undertakes to present two questions here. First, that the Court did not recognize petitioner's judgment. This question was not raised in the District Court, nor in the Circuit Court of Appeals. It cannot now be held for error. However, the question is conclusively settled against the appellant in

Section 83 (b) of the Bankruptcy Act, which provides in part: "That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources, shall be of one class." This is exactly the manner in which the Court recognized plaintiff's judgment. The judgment was based upon coupons, and all persons holding coupons were dealt with alike. In other words, "the manner in which they are evidenced" is taken to mean that the claim of the appellant is based upon coupons, but because of default it is evidenced by judgment. Whether it be considered evidenced by judgment or coupons, both are payable "without preference out of funds derived from the same source."

Petitioner cites Section 63 (a) of the Bankruptcy Act, but that applies to general bankruptcies only. The law under which we are proceeding is known as the Municipal Bankruptcy Act, being Chapter 9 of the Bankruptcy Act, Sec. 81-83.

There is a recent decision of Circuit Court of Appeals, Fifth Circuit, bearing on this matter, Texas Agr. Ass'n. vs Hidalgo County, W. C. & Imp. Dist. No. 1, 125 F. 2d. 829. In that case one creditor obtained the regular cash distribution which was raised by a loan from the Reconstruction Finance Corporation, the same as other creditors, and in addition, obtained a note from the Imp. Dist. for the balance of the claim. The note was held invalid on the ground that it increased the public debt without the required vote of the taxpayers in the Imp. Dist. as required by law, yet it is indicated very clearly that the Court regarded the effort of the creditor to collect the note as being a preference over other creditors and held "There is no equity in the claim that would warrant a departure from the settled rule of the law in Texas."

Appellant contends there were two plans of composition. This is without foundation. The statement of appellant (Peti-

tion, Page 15) that "The Court must have granted a hearing on both plans which it utterly failed to do" is flatly contradicted by the record. Both plans were attached to and made the plan of composition. In fact, there was but one plan. The 1936 plan was supplemented by the 1940 plan. The evidence referred to had to do with the indebtedness of the County in 1936, the expenses of the 1936 refunding plan, reasons for modification of the 1936 refunding plan as submitted in the 1940 supplement. Appellant's thirty-nine questions and answers (R. 33-46) had to do with the County's finances under the 1936 plan and the supplement of 1940.

FIFTH QUESTION

Here, again, there are two questions. The first is that there was error because the petitioner was required to make a greater concession of interest than others. In Taylor vs. Provident Irr. Dist., (U. S. C. A. Ninth Circuit), 123 F. 2d 965, Taylor, who opposed the refunding plan, contended that his bonds should be paid in full under the plan of composition in which the creditors of the Irr. Dist. would receive 20 cents for each dollar of the principal amount of their bonds, because his bonds were the only ones outstanding of the same issue, all other bonds of the same issue having been paid in full and bonds maturing later than his having been paid in full. His bonds had not been paid, on the mistaken assumption that they were outlawed. The Court held: "The Bankruptcy Act places on a basis of equality all existent creditors whose claims are payable from the same source, and in event of bankruptcy the bonds of the District of whatever maturity and whether they have been registered or not are a parity." As stated above, Taylor filed petition in this Court for writ of certiorari, which was denied, 86 U. S. L. ed. 811. In another Circuit Court of Appeals case, Ninth Circuit, McDonald, et al, v. Carbona Irr. Dist., 123 F. 2d 869, McDonald contended that the plan

of composition was unfair because it made no provision for payment of interest either on bonds or warrants accruing after a certain date, while bond interest coupons maturing on or before that date were to be taken care of in full. The Court held against him. McDonald also petitioned this Court for writ of certiorari, which was also denied, 86 U. S. L. ed. 868.

The second question embodied in petitioner's fifth question, is on the matter of the failure to include the School District bonds. The explanation is that the holders of the School District bonds, even though the County assumed their payment, can continue to hold the School Districts on their bonds; that is, the holders of the School District bonds can look to two sources for the payment of their bonds, the County and the School District. Therefore, such bonds do not come in the same classification as the general obligations of the county.

Petitioner contends that the 1936 refunding plan was in default in 1940 because the County assumed the School District indebtedness. Now, as a matter of fact, the County was in default July 1, 1940, regardless of the School District bonds. The fact that the County was going to have to take over the payment of the School District bonds was a further and compelling reason, in addition to reasons already existing, for asking creditors to accept the 1940 refunding plan.

SIXTH QUESTION

Petitioner contends that the District Court erred in finding that no fiscal agent promoting the composition was compensated by both the debtor county and its creditors and in further finding that the North Carolina Municipal Council, Inc., was not employed by the County to promote the plan of composition. As to the connection of the North Carolina Municipal Council with the plan of composition, the evidence shows clearly, and there is nothing to the contrary, that the North

Carolina Municipal Council was not employed by the County to submit the plan of composition or to obtain acceptance of creditors to the plan of composition. The North Carolina Municipal Council was employed as the County's fiscal agent to handle the 1936 and the 1940 refunding plans, as outlined in contracts between the parties and introduced in evidence. The connection of the Municipal Council with the refunding plans was fully disclosed in the District Court. Counsel for Mrs. Ouerbacker devoted a great deal of time trying to show that the North Carolina Municipal Council realized profit in the refunding plan both from creditors and the County, but counsel's efforts along this line were completely unsuccessful. Counsel for appellant called to the stand and examined the President of the North Carolina Municipal Council, Mr. W. K. Gray; disconnected portions of whose testimony are printed in the record, pages 58-62, but the name of the witness is not given nor the name of the attorney conducting the examination. Transcript of the hearing shows that Mr. Sandridge of appellant's counsel conducted the direct examination.

The District Court made findings as to the connection of the North Carolina Municipal Council with the refunding plan, its compensation, etc., and then made the further finding which is quoted on page 21 of petition. The finding quoted on page 21 of the petition is absolutely correct because the North Carolina Municipal Council was not asked to secure acceptances of creditors to the plan of composition. Of course, the plan of composition consisted of the 1936 plan and 1940 supplement, but the plan of composition itself was submitted to the creditors by Henderson County through the North Carolina Local Government Commission.

Coming directly to the question of compensation of the North Carolina Municipal Council, there is no evidence whatever that it obtained or attempted to obtain any compensation

from bondholders for handling the refunding plans as a fiscal agent of Henderson County. Counsel for appellant made a most strenuous effort to show that it did receive or might have received compensation from bondholders but failed to do so, and there is nothing in the record contrary to the findings of the Court with respect to the compensation of the North Carolina Municipal Council. It is stated in the petition, page 24, "The Council was nothing more than a Bondholders Committee acting as agent and representative of the bondholders." It certainly was not a Bondholders Committee. Any bondholder or representative of a bondholder could become a member. The membership included banks, insurance companies, and fraternal orders (R. 59). Petitioner could have become a member if she had so desired. It neither owned nor controlled any bonds.

In the Circuit Court of Appeals, Counsel for appellant in their brief and in their oral argument tried to make the facts of this case appear to be similar to the objectionable features of the Avon Park case (American United Mutual Life Insurance Co. vs. Avon Park, 311 U. S. 138, 85 L. ed. 91). There is no similarity whatever in the facts. In the Avon Park case the fiscal agent of Avon Park not only received an exhorbitant fixed compensation from Avon Park, but also received compensation from both Avon Park and its creditors and also had a speculative stake in possible price appreciation of bond coupons. Furthermore, the fiscal agent owned a large block of the Avon Park bonds which were to be counted as a part of the 51 per cent of accepting creditors. Some of the bonds had been purchased for the purpose of acquiring a sufficient number of bonds to put the plan through. Most of these facts were concealed from the bondholders by the fiscal agent. The total compensation of the North Carolina Municipal Council as set forth in the refunding plans which were submitted to bondholders amounted to approximately .6 of 1 per cent of the

total Henderson County obligations. In the Avon Park case the fiscal agent received a fixed fee of 4 per cent and the other compensations in addition. In McDonald, et al, vs. Banta Carbona Irr. Dist., 123 F. 2d. 968, the Reconstruction Finance Corporation which loaned the District money to be paid creditors in the composition plan stipulated a little more than 1 per cent for use for expenses. There is no similarity whatever between this case and the Avon Park case.

On page 27 of appellant's "supporting brief" there is a statement by appellant's counsel, as follows:

> "The Bankruptcy Court was to be the fair and impartial arbiter exercising at all times an 'informed, independent judgment.' Both the District Court and the Circuit Court of Appeals failed to perform this function in this case and approved of erroneous proceedings merely because it was represented that the majority of creditors were anxious to rush the plan through to a conclusion."

We will not assume that appellant's counsel intends any reflection by intimating that the Court was high-pressured into deciding this case erroneously because the creditors desired to bring it to a conclusion. We do not believe that the Court would commit error intentionally merely "because it was represented that the majority of the creditors were anxious to rush the plan through to a conclusion." Haste is sometimes good judgment, but we know of no reason why the Court should commit error intentionally merely because the litigants were hasty. We seriously doubt this statement on the part of appellant's counsel and challenge it as being unwarranted from all the facts.

After all, we must keep as a guiding star before us the question: Has the County offered to its creditors all that it is financially able to do within reason, under the circumstances?

Technicalities will not answer this question. The trial Judge held that the plan of composition was fair and reasonable to all the creditors alike. This holding was supported by evidence. The Circuit Court of Appeals approved the judgment of the Court below. Approximately 99 per cent of the creditors join in this approval. What more could be said in support of a plan of composition?

The decision in this case by the Circuit Court is full and complete. It answers every objection of the appellant. It meets out equity to all the creditors alike.

WHEREFORE, respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

KESTER WALTON,
Asheville, North Carolina.

M. M. REDDEN,
Hendersonville, North Carolina.

THOS. H. FRANKS,
Hendersonville, North Carolina.

Counsel for Respondent.